



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 7, 2023

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BOARD DECISIONS

Appellant: Michelle E. Kaszowski
Agency: Department of the Air Force
Decision Number: [2023 MSPB 15](#)
Docket Number: CH-0752-16-0089-I-1
Issuance Date: April 4, 2023
Appeal Type: Adverse Action

Election of Remedies

The agency moved to dismiss the appellant's removal appeal on the basis that the appellant had previously elected to challenge her removal through the negotiated grievance procedure, thus waiving her Board appeal rights. In response, the appellant argued that, although she had initially pursued a union-filed grievance, the union unilaterally declined to pursue arbitration on her behalf. The administrative judge found that the appellant had made a binding election under 5 U.S.C. § 7121(e)(1) to grieve her removal, thus waiving her Board appeal rights, and that the union's decision not to pursue arbitration did not render her election invalid. Accordingly, the administrative judge dismissed the appeal for lack of jurisdiction. The appellant petitioned for review.

Holding: The Board found that the appellant's election to challenge

her removal through the negotiated grievance procedure was not binding, and thus did not preclude her Board appeal. Although the agency informed the appellant of the available methods for challenging her removal, it did not advise her that electing to file a grievance would result in waiver of her Board appeal rights.

1. Under 5 U.S.C. § 7121(e)(1), an employee subjected to an adverse action and who is covered by a negotiated grievance procedure may challenge such an action by filing either a grievance under the negotiated grievance procedures or a Board appeal under 5 U.S.C. § 7701, “but not both.” However, for an election of remedies to be binding, it must be knowing and informed. When an agency takes an action without informing the appellant of her procedural options under § 7121 and the preclusive effect of electing one of those options, any subsequent election by the appellant is not binding.
2. For this reason, the Board’s regulations require that when an agency issues a decision notice to an employee on a matter appealable to the Board, it must provide the employee with notice of the available avenues of relief and the preclusive effect any election will have on the employee’s Board appeal rights. Among other things, the agency must provide notice of any right the employee has to file a grievance or seek corrective action under subchapters II and III or 5 U.S.C. chapter 12, including “[w]hether the election of any applicable grievance procedure will result in waiver of the employee’s right to file an appeal with the Board.” 5 C.F.R. § 1201.21(d)(1).
3. Here, the agency’s decision letter informed the appellant of the available methods of challenging her removal, including submitting a Board appeal, seeking corrective action from the Office of Special Counsel [OSC], filing a grievance, and filing a discrimination complaint. The letter further indicated that “[w]hichever is filed first, an appeal to the MSPB, an appeal for corrective action to OSC, a grievance under the negotiated grievance procedure, or a discrimination complaint, shall be considered an election by you to proceed under that appeal process.”
4. However, the agency did not fully explain the consequences of choosing the appeal or grievance procedures. In particular, the letter did not specifically inform the appellant that she could raise the matter at issue with the Board or under the negotiated grievance procedures, “but not both,” 5 U.S.C. § 7121(e)(1), nor did it provide her with notice as to [w]hether the election of any

applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board," 5 C.F.R. § 1201.21(d)(1).

5. Thus, the appellant did not make a knowing an informed election and did not waive her right to file a Board appeal. Accordingly, the Board remanded the appeal for adjudication on the merits.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Jason W. Reuter

Respondent: Department of Commerce

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2021-2216](#)

Petition for Review of MSPB No. AT-0752-18-0388-I-2

Issuance Date: April 3, 2023

Due Process - Ex Parte Communications

Board Procedures

Mr. Rueter worked for the agency as a fishery biologist. In November 2014, two female employees of agency contractors informed Mr. Reuter's first-level supervisor, Dr. Bolden, that Mr. Rueter had engaged in inappropriate conduct toward them at a Halloween party and on the following day. In June 2015, another troubling incident occurred when Mr. Rueter loudly yelled disrespectful accusations at Dr. Bolden in her office. In November 2016, Mr. Rueter's second-level supervisor, Mr. Bernhart, proposed to remove him for misconduct. Mr. Reuter filed a complaint with the Office of Special Counsel (OSC), and OSC requested that the agency stay the removal action pending its investigation. In August 2017, Mr. Rueter's third-level supervisor, Mr. Strelcheck, informed him that the agency was rescinding the first proposed removal letter.

In September 2017, Mr. Bernhart issued a second notice, proposing to remove the appellant for conduct unbecoming a Federal employee (based on the appellant's conduct at the Halloween party and the following day), and disrespectful conduct toward a supervisor (i.e., Dr. Bolden). In response, Mr. Reuter claimed that his removal was retaliation for complaints he had made regarding Dr. Bolden, including that she had committed terrible management abuse" and created a "hostile work environment." Mr. Strelcheck sustained

the charges and agreed that removal was the appropriate penalty.

Mr. Reuter appealed his removal to the Board. Following a hearing, the administrative judge sustained the charges and affirmed Mr. Rueter's removal. The administrative judge found that Mr. Rueter failed to prove his affirmative defenses, including his claim that the agency denied him due process by engaging in improper ex parte communications on several occasions.

On appeal to the Federal Circuit, Mr. Reuter again argued that the agency engaged in improper ex parte communications. He further argued that the administrative judge erred by excluding the testimony of a requested witness, Mr. Hoffman, and by denying Mr. Rueter's motion requesting *in camera* inspection of certain documents over which the agency asserted privilege.

Holding: The court found that the administrative judge correctly applied the framework of *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999), in determining that the ex parte communications at issue did not violate Mr. Reuter's right to due process. The court further found that the administrative judge did not improperly deny the appellant's requests for testimony from Mr. Hoffman and *in camera* review of documents over which the agency had asserted privilege.

1. Citing its decision in *Stone*, the court explained that while certain ex parte communications can undermine due process, only those which "introduce new and material evidence to the deciding official will violate the due process guarantee of notice." In determining whether information is "new and material" such that it violates due process, factors to be weighed include (1) "whether the ex parte communication merely introduces 'cumulative' information or new information"; (2) "whether the employee knew of the error and had a chance to respond to it"; and (3) "whether the ex parte communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner." The ultimate inquiry is "whether the ex parte communication is so substantial and so likely to cause prejudice that no employee can be fairly required to be subjected to deprivation under such circumstances." After describing several cases in which the court had applied the *Stone* factors to different sets of facts, the court turned to the three communications Mr. Reuter challenged on appeal.
2. The first allegedly improper ex parte communication was a March 9, 2017 email from Dr. Bolden, sent to Mr. Strelcheck, Mr. Bernhart, and other agency managers. In that email, Dr. Bolden responded to an agency-wide announcement regarding sexual harassment policies,

criticizing the announcement as a “hollow gesture” in light of the “lack of agency action” regarding Mr. Reuter, and also encouraged the recipients to “follow through and take action on the pending harassment matter.” The administrative judge found that this communication did not violate Mr. Rueter’s due process rights, citing evidence that (1) Mr. Strelcheck and Mr. Bernhart both testified that they agreed with Dr. Bolden that the matter had been pending too long; (2) Mr. Strelcheck further testified that the email had no effect on his decision to sustain the proposed removal; and (3) the relationship between Dr. Bolden and Mr. Strelcheck and Mr. Bernhart (her superiors) was such that the email could not have exerted undue evidence on either individual. The court agreed and found the administrative judge had correctly applied the *Stone* factors.

3. The second communication at issue involved emails between Mr. Strelcheck and Mr. Bernhart in which they discussed the status of the removal process and the issuance of the second notice of proposed removal. In the first email, Mr. Bernhart attached Dr. Bolden’s comments on a performance plan and stated that her comments reflect that Dr. Bolden perceives herself to be “the victim in this narrative” and that he expected there to be “some risk of further complaints from” Dr. Bolden regarding the pending action against Mr. Reuter. Mr. Bernhart then asked for Mr. Strelcheck’s advice as to whether further documentation should be prepared and proposed a discussion regarding the pending OSC investigation. In reply, Mr. Strelcheck advised Mr. Bernhart to contact HR regarding Dr. Bolden’s potentially biased comments and stated generally that he had contacted OSC and would continue to do so going forward. Before the court, Mr. Reuter asserted that the communications showed that Mr. Bernhart “attempted to influence [Mr.] Strelcheck . . . into taking action against” Mr. Reuter. The court found that the emails were perfunctory and administrative in nature, and agreed with the administrative judge that they merely introduced cumulative information. The court further found that the communications from Mr. Bernhart were not of the type likely to result in undue pressure on Mr. Strelcheck, particularly given that Dr. Bolden was their subordinate.
4. The third allegedly impermissible ex parte communication was an email from November 10, 2016 (shortly after the first removal proposal) in which Mr. Bernhart sent a timeline of events bearing on Mr. Reuter’s case to Mr. Strelcheck. The court agreed with the administrative judge that the timeline did not provide any new and material information. In sum, the court found that none of the communications challenged by Mr. Rueter rose to the level of a due process violation.
5. The court next turned to Mr. Rueter’s contention that the Board

improperly denied his request to present testimony from Mr. Hoffman, who would have testified that he was willing to hire Mr. Reuter to work in his own branch of the agency, but that Mr. Bernhart declined the reassignment. On review, Mr. Reuter argued that the proffered testimony would have been relevant to the *Stone* factor analysis, but the court disagreed, and noted that the appellant had not made that specific argument before the Board in any case.

6. Finally, the court considered Mr. Reuter's argument that the administrative judge improperly denied his request for *in camera* review of documents the agency had withheld on grounds of attorney-client and attorney work privilege. The court disagreed, finding no indication that the agency had inappropriately asserted privilege over those documents.

NONPRECEDENTIAL:

Webb v. Office of Personnel Management, No. [2022-1984](#) (Fed. Cir. April 4, 2023) (MSPB No. DA-844E-16-0084-I-1)

Ms. Webb filed for disability retirement under FERS in 2014, nearly 8 years after her separation from Federal service, and OPM disallowed the application because it was not filed within the 1-year deadline under 5 U.S.C. § 8453. The Board affirmed OPM's decision. The court affirmed, finding that Ms. Webb had not shown that her application was filed within the statutory deadline or that waiver of the 1-year deadline was warranted.

Mungo v. Department of the Army, No. [2022-1266](#) (Fed. Cir. April 4, 2023) (petition for review of arbitrator's decision)

Mr. Mungo, a Department of the Army Security Guard (DASG), was required to maintain a certification under the Army's Individual Reliability Program (IRP), a security program designed to ensure that security guards are fit for duty and that their characters and trustworthiness comport with the high standards expected of law enforcement personnel. In July 2020, Mr. Mungo was permanently decertified from the IRP based on a May 2020 incident in which he made violent threats toward another DASG. The agency then removed him on charges of conduct unbecoming a Federal employee and failure to maintain a condition of employment, i.e., the IRP certification. Mr. Mungo invoked arbitration, and the arbitrator upheld the removal, sustaining both charges. On appeal to the Federal Circuit, Mr. Mungo argued that the agency failed to demonstrate a reasonable basis for the decertification and that the decertification was procedurally improper because the decision-maker lacked appropriate authority. The court disagreed on both counts and affirmed the arbitrator's decision.

Simmons v. Office of Personnel Management, No. [2022-2238](#) (Fed. Cir. April 5, 2023) (MSPB Docket No. SF-0842-16-0801-I-1)

Following her retirement, Ms. Simmons applied to make a deposit for four periods of prior service for which no retirement deductions had been withheld. OPM notified her that she had 30 days to make a required deposit, that an election not to do so would be irrevocable, and that installment payments were not permitted. Ms. Simmons asked to make the payment in installments, citing financial hardship. OPM reiterated that she could not pay in installments, and provided her a final 45-day period in which to make a deposit. Before that period expired, Ms. Simmons informed an OPM representative that she would not make the deposit, and OPM issued a final decision stating that her annuity had been finalized without service credit for the four periods at issue. The Board affirmed OPM's final decision, and Federal Circuit affirmed the Board's decision on review. In doing so, the court found that Ms. Simmons had identified no statute or regulation requiring OPM to accept deposit statements in installments. The court further found that OPM appropriately relied on Ms. Simmons's statement that she would not pay the deposit, and thus did not commit procedural error in finalizing her annuity before the 45-day period expired.

Castillejos v. Office of Personnel Management, No. [2023-1207](#) (Fed. Cir. April 6, 2023) (MSPB Docket No. SF-0831-17-0586-I-1)

Mr. Castillejos sought review of the Board's September 12, 2022 decision, but the court did not receive his petition until 71 days later, after the 60-day filing deadline under 5 U.S.C. § 7703(b)(1)(A). Accordingly, the court dismissed the petition as untimely filed. The court noted that the deadline is mandatory and jurisdictional, and requires actual receipt by the court, not just timely mailing.

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